No. 247.

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JAMES H. McKENNEY,
CLERK

Brief of Beall for P. E.

Filed April 21, 1898.

# Supreme Court of the United States,

## OCTOBER TERM, 1897.

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JOHN R. HOLLOWAY,
*Plaintiff in Error,*

*vs.*

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB AND WILLIAM E. WEBB,
*Defendants in Error.*

No. 247.

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In Error to the Supreme Court of the Territory of Oklahoma.

# BRIEF FOR PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

Saxton Printing Co.,
619 E Street N. W.

...IN THE...

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## STATEMENT.

This is an attachment at law by Dunham, Buckley & Co., merchants of New York, against John R. Holloway, to recover an alleged indebtedness of $5,004.58, by open account for merchandise alleged to have been sold Holloway in 1890 and 1891, while doing business as a merchant at Fort Worth, Texas.

In September, 1891, Holloway transferred his business from Fort Worth, Texas, to Oklahoma, Oklahoma Territory, of which he wrote Dunham, Buckley & Co., receiving from them a letter as follows:

"NEW YORK, Sept. 25, 1891.

MR. J. R. HOLLOWAY,

Oklahoma, I. T.:

DEAR SIR:—Your favor, notifying us of your removal to Oklohoma, I. T., is at hand. We have no doubt that it is a good move, and trust you will be able to realize on sales at once and send us some money.

Yours truly,

DUNHAM, BUCKLEY & CO. (Rec., 87.)"

October 31, 1891, defendants in error brought suit in the district court of Oklahoma county, O. T., and on the same day obtained an order of attachment, and had the entire stock of goods of Holloway seized. The affidavit for attachment alleged that Holloway was indebted to Dunham, Buckley & Co. in the sum of $5,004.58 principal, and $183.18 interest, for goods and merchandise sold and delivered by the plaintiff to the defendant "at various times between November 1st, 1890, and March 10, 1891, and that the said defendant, J. R. Holloway, is about to sell, convey, and otherwise dispose of his property subject to execution, with the fraudulent intent to cheat and hinder and delay his creditors; and that said J. R. Holloway is a non-resident of said Territory of Oklahoma." (Rec., p. 8.)

November 5, 1891, Holloway filed a general denial, duly verified by his own oath, to the petition or complaint of plaintiffs (Rec., p. 13.) November 23, 1890, he filed a duly verified traverse of the affidavit for attachment, thus:

"1st. He denies each and every allegation in plaintiff's affidavit for attachment.

"2d. That the grounds alleged in plaintiff's affidavit for attachment are each and every one wholly untrue.

"Wherefore, the defendant demands judgment in the attachment proceedings."

The plaintiffs gave notice that they would take the depositions of J. H. Bradley, J. H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin Davis, all of New York, and did take the depositions of said persons. (Rec., pp. 31–74.) The defendant made motions to suppress the depositions of each and all of the New York witnesses, assigning as grounds of motion in each, that the deposition was not taken in compliance

with law; that defendant had not been notified of the time and place of taking said depositions; and that none of said depositions were legally or properly certified. (Rec., pp. 22–23.)

The trial court overruled said motion by the following order:

"Now, on this 13th day of June, A. D. 1892, this cause came on for hearing on the motion of defendant to suppress the depositions of J. H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, heretofore filed herein, and after argument of counsel, it is considered, ordered, and adjudged by the court that said motion be, and the same hereby is overruled; to which judgment and order of the court overruling said motion the defendant duly excepted and excepts.

JOHN G. CLARK, Judge." (Rec., 17.)

The record (p. 28), recites:

"The cause being at issue, and a jury empanneled and sworn, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

"Plaintiffs offered and read the deposition of J. H. Bradley; also the depositions of James H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin A. Davis; also the depositions of A. B. Smith and James Riley. To the introduction of which the defendant, at the time, excepted."

The testimony having been introduced, the court gave the jury, in writing, 14 instructions (Rec., pp. 24–25), among which were the following:

Gentlemen of the jury, I instruct you as follows:

1st. This action was commenced for the purpose of recovering the purchase price of certain goods alleged by the plaintiff Dunham to have been sold to the defendant, J. R. Holloway.

2d. To secure the collection of said debt, should the plaintiff recover judgment, the goods of the defendant were attached upon two grounds.

1st. That the said defendant was not a resident of this Territory.

2d. That he was fraudulently disposing of his property with intent to cheat, hinder, or delay his creditors.

3d. You are trying two issues:

1st. Whether or not the attachment herein shall be sustained.

2d. Whether or not at the time of the commencement of this suit and at the present time the defendant was and is indebted to plaintiffs; and, if so, in what sum? and upon these two issues you will make separate verdicts.

5th. If you shall find from the evidence that the defendant at the time of the issuing of the writ of attachment herein was a non-resident of the Territory of Oklahoma, you will find the issue for the plaintiffs on this attachment; or if you find from the evidence — was disposing of his property subject to execution with the fraudulent intent to cheat, hinder, or delay his creditors at the time of the issuing of the writ of attachment herein, you will find the issue for the plaintiffs in the attachment.

7th. To constitute a change of residence in contemplation of law, in attachment suits, there must not only be an actual change of abode, but it must also be with the intent of making it, the place to which the party removes, the fixed and permanent home of the party. The fact that his family has or has not accompanied him is a circumstance that the jury may consider in determining whether or not the change has been made in good faith. In fact, they should consider all the circumstances and testimony in considering this question.

8th. You are the exclusive judges of all the facts and circumstances and of theweight to be given to the testimony of each of the witnesses, and should take all the facts and circumstances into consideration in passing upon the question of the residence of the defendant at the time of the suing out of the attachment, and as to the question as to whether he intended to hinder, delay, or defraud his creditors, and as to the amount due the plaintiff if you so find.

9th. Though you may believe from the evidence that the defendant came from the State of Texas and located in Oklahoma City on or about September, 1891, and here engaged in business in the selling of goods, wares, and merchandise, yet

this of itself does not constitute him a resident of the Territory of Oklahoma. To constitute him a resident of the Oklahoma Territory he must, in addition to having moved here and engaged in business, had determined to make this, Oklahoma, Territory, his permanent residence; and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there nor at the time of the issuing of the writ of attachment herein, intend to make Oklahoma Territory the place of his permanent residence, or if he was undetermined as to whether or not he would make Oklahoma Territory the place of his permanent residence, or that he intended to return to his home and family at Ft. Worth, Texas, at some future time, then and in that event he was a non-resident of the Territory of Oklahoma at the time the writ of attachment issued in this case.

10th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiffs for goods, wares, and merchandise purchased of plaintiffs by defendant, as charged in said complaint, then you will find for the plaintiffs in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent per annum, from March 23rd, 1891, to the present.

11th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances that you may take into consideration in determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff on the issue in attachment.

12th. If the jury believe from the evidence that the defendant did not intend to make Oklahoma his permanent home at the time the attachment was sued out herein, and had not come here with the intention of changing his domicile in

Texas, but came here for the purpose of engaging in business temporarily and with the intent of returning to his home and family in Texas at some future time, then and in that event he is, for the purpose of attachment in this case, a non-resident of the Territory of Oklahoma.

13th. You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict.

14th. Forms of verdict will be handed to you.

June 15, 1892.

JOHN G. CLARK, *Judge.*

The questions hereto attached you will answer by writing after each question the words "yes" or "no." You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

JOHN G. CLARK, *Judge.*

*Special Questions Submitted to the Jury.*

Was J. R. Holloway, on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with intent to cheat, hinder, or delay his creditors?

Was J. R. Holloway, on the 31st day of October, 1891, a non-resident of Oklahoma Territory?

To the giving of which instructions and each of them the defendant at the time excepted.

The jury having found for the plaintiffs, the court entered judgment as follows:

"Now, at this day, this cause coming on to be heard and the plaintiffs appearing, by their attorneys, and the defendant appearing in his own proper person and by his attorneys, and the defendant requesting a jury, all and singular the issues herein made by the plaintiffs' complaint and affidavit for attachment and defendant's answer, traversing and denying all and singular the matters alleged in plaintiffs' said complaint

and affidavit for attachment, are submitted to a jury ; and the jury, after hearing the evidence, the instructions of the court, and the argument of counsel, retire to consider of their verdicts, and, after considering of the same, return into the court the following verdicts :

" We, the jury, duly empaneled and sworn in the above case, find for the plaintiffs on the attachment issue.

EUGENE WALKER, *Foreman.*"

" We, the jury, duly empaneled and sworn in the above-entitled cause, find for the plaintiffs, and assess their damages at $5,434.61.

EUGENE WALKER, *Foreman.*"

And the court, at the instance of the defendant, having submitted in writing to the jury the following questions :

" Was J. R. Holloway on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with the intent to cheat, hinder, and delay his creditors?

" Was J. R. Holloway on the 31st day of October, 1891, a non-resident of Oklahoma Territory? "

The jury at the time of rendering their verdict as aforesaid, returned as their special finding to each of said questions the answer " Yes; " which said questions, with the answer " yes " thereto, were separately and severally signed " Eugene Walker, foreman."

" Wherefore the court doth find," etc. (Rec., pp. 11–12).

The defendant made a motion for new trial, assigning among other causes the following :

" 4. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

" 5. The court erred in overruling defendant's motion to suppress the depositions of James H. Dunham, J. T. Dutcher, Wm. H. Walker, and Edwin A. Davis.

" 12. The court erred in giving instructions numbered 6, 8, 9, 10 and 11.

" 13. The assessment of the amount of recovery is erroneous, being too large.

" 14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

" 15 The verdict of the jury on the attachment issue is contrary to law.

" 16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

"17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law." (Rec., pp. 27–28).

This motion being overruled, a general bill of exceptions was taken, signed and sealed according to law, embodying all the proceedings at the trial, not made by law a part of the record, including all the testimony. (Rec., pp. 21–90.)

From the judgment of the district court the case was carried by the defendant Holloway, by appeal, to the Supreme Court of Oklahoma, where it was heard upon a complete record, and assignment of errors. Among the errors assigned in the Supreme Court of Oklahoma were the following:

Third. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

Fourth. The court erred in overruling the defendant's motion to suppress the depositions of J. H. Dunham, J. T. Dutcher, Wm. Walker, and Edwin A. Davis.

Fifth. The court erred in allowing the exhibit attached to the depositions of James H. Dunham, J. T. Dutcher, W. H. Walker, and Edwin A. Davis to be read in evidence.

Eleventh. The court erred in giving each and all the instructions numbered 6, 8, 9, 10, and 11 to the jury over the objections of the defendant.

Twelfth. The court erred in giving and entering judgment for the amount it did, which is unauthorized by the evidence in the case, and in excess of any amount shown by the evidence to be due.

Thirteenth. The verdict of the jury on sustaining the attachment and the judgment of the court thereon is contrary to the law and evidence of the case.

Fourteenth. The verdict and findings of the jury and the judgment of the court thereon are contrary to the evidence and law of the case.

Fifteenth. The special findings of the jury numbered one and two are unwarranted and unsustained by the evidence and contrary to law.

Sixteenth. The instructions given to the jury by the court

as a whole are misleading and do not correctly state the law applicable to the evidence and issues in the case.

Seventeenth. The court erred in overruling defendant's motion for a new trial and rendering judgment upon the illegal findings and verdict of the jury.

Nineteenth. The complaint and exhibits thereto attached and the evidence in the case show that the contract and purchase of the goods, wares, and merchandise was in the State of New York and governed by the laws of the State of New York, under which laws only six per cent interest can be allowed and collected, and the court erred in allowing interest on said account at the rate of seven per cent per annum.

Twentieth. The court erred in rendering judgment for more than the amount claimed in the complaint and interest thereon, and more than the evidence and accounts filed as exhibits show to be due.

Twenty-first. Said judgment is not sustained by the proof, nor authorized by the complaint nor evidence in the case and is erroneous. (Rec., pp. 92–93.)

The Territorial Supreme Court first reversed the district court, and remanded the case for a new trial, as shown by the following extracts from the opinion of the court:

"Prior to the commencement of the trial the defendant below filed a motion to suppress the depositions of certain witnesses for the plaintiff, and to the ruling of the court upon such motion an exception was properly saved. The depositions referred to were those of J. H. Bradley, James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis.

"The deposition of the first-named witness was not taken at the same time as those were of the other witnesses.

"In so far as the objection to the deposition of Bradley is concerned, we are of the opinion that it will not lie, such deposition being taken in substantial compliance with the statutes, but we think the motion to suppress the depositions of Dunham, Dutcher, Walker and Davis should have been sustained upon the first ground stated in such motion, to wit:

"That the certificate of the notary does not show the place where the said depositions were taken.

"An examination of the record discloses the fact that there

is no evidence whatever showing any indebtedness upon the part of Holloway to the plaintiff below, except such as appeared in the depositions of Dunham, Dutcher, Walker and Davis; and, as we have shown, the motion to suppress such depositions should have been sustained, and the defendant below having denied the indebtedness, the claim of the plaintiffs must be maintained by competent evidence. The judgment of the lower court must be reversed and the cause remanded for a trial *de novo*." (Rec. 103–104–105).

Upon a rehearing of the case the Territorial Supreme Court set aside its former judgment, and affirmed the judgment of the district court on the grounds that independent of the depositions which had been erroneously admitted by the trial court, there was sufficient evidence to establish the account sued on. The material parts of the opinion of the court are as follows:

In the former opinion we held that the trial court was in error in not sustaining the objections of defendant below to the introduction of the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin Davis; that if such depositions had been rightfully excluded no evidence would appear in the record tending to establish the validity of the amount of the debt sued upon. In this conclusion we erred. In the deposition of Bradley, agent of the plaintiff, is found testimony which shows that Bradley, acting for plaintiff below, presented the account of said plaintiffs to Holloway, demanded payment therefor, and that the amount of the claim was agreed to by Holloway and payment refused simply upon the ground of inability to meet the obligation. This testimony is uncontradicted. It appears from the record that Holloway, except by his answer, raised no issue upon the question of indebtedness. The depositions which were by the court below improperly admitted only go to the question of indebtedness; they nowhere bear upon the issue raised under the attachment proceeding. Consequently the evidence contained in such depositions was cumulative, and, there being sufficient without them to prove the indebtedness, the ruling of the court below did not prejudice the rights of Holloway. We will now

take up the discussion of the assignments of error not noticed in the former opinion, which are as follows:

Complaint is made of the instructions given by the court to the jury. The attachment was based upon two grounds, to wit: That Holloway was disposing of his property with the fraudulent intent to cheat, hinder, and delay his creditors, and that he was a non-resident of the Territory of Oklahoma. The instructions of the court relative to the non-residence of Holloway are particularly complained of. After the instructions were prepared they were numbered and signed by the judge, and following this there appears in the record this entry: "To the giving of which instructions and each of them the defendant at the time excepted."

We find, as before stated, two grounds set forth in the affidavit filed as a basis for the attachment—the ground of non-residence and that of the charge of fraudulently disposing of property with intent to cheat, hinder, or delay creditors. Evidence was introduced tending to support both of these issues. The two issues were submitted to the jury in the form of special questions under proper instructions from the court. The jury found, on both propositions, against the defendant. There being no issue as to the indebtedness, if the court correctly instructed as to either question raised in the attachment affidavit, no good reason exists for disturbing the verdict. We are not certain that the court stated the law correctly upon the question of non-residence. It appears that Holloway was in this territory, engaged in the business of merchandising, and that he had no other place of business. This territory was the place of his residence for that purpose. In giving his instructions, the court below seemed to take the view that this was not enough to make him a resident in contemplation of the attachment law. We are not certain that the court correctly stated the law upon this proposition.

Way *v.* Way, 64, Ill., 407.
Williamson *v.* Parisien, 1 Johns. Ch., 388.
Frost *v.* Brisbin, 19 Wend., 11.

It would seem that residence and domicile do not mean the same thing. The court below instructed, in effect, that a

man's residence must be at the place of his home. But grant that the court was in error upon this proposition, upon which question it is unnecessary for us to pass at this time, there still remains the further question raised upon the issue of the fraudulent disposition by Holloway of his property. The instructions of the court upon this question are not subject to serious criticisms. How, then, were the rights of Holloway prejudiced by the error of the court in wrongly instructing the jury upon the question of non-residence? There were two issues decided against defendant upon the attachment. A decision upon either adverse to the defendant below would have been sufficient to carry the verdict. We therefore hold to the view that where a suit in attachment is based upon two distinct grounds and a judgment is rendered against a defendant upon both grounds alleged that error of the court in instructing as to one of such grounds, is not error such as will warrant a reversal of the case.

3. It is contended that the court erred in instructing the jury that they "need not be unanimous in their verdict; that nine were sufficient to return a verdict." As held by this court since this cause was tried below, such an instruction was erroneous. (*Bradford* v. *Territory*, 1 Ok., 366.) But no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors. We cannot ,therefore, consider the objection.

4. It is contended that the judgment was excessive. The sum sued for was $5,004.58, together with interest from the time the same became due at seven per cent per annum. The jury returned a verdict in the sum of $5,434.61. The suit was instituted upon an account, and an itemized bill of the goods purchased was attached to and made a part of the complaint. The time of such purchase and the dates when the several items so purchased were to be paid for *was* set forth. The prayer of the complaint asked for judgment for the sum of $5,004.58, "with interest thereon, according as the same may appear to be due from the items of said exhibit, at the rate of seven per cent per annum." The exhibit so attached to the

complaint is as much a part of the same as if incorporated in the complaint.

Budd *v.* Cramer, 14 Ks., 101.
State *v.* School Dist., No., 3, 34 Ks., 237.

By reference to the exhibit for the purpose of ascertaining the date when each purchase became payable and computing the interest no trouble is found in determining the exact sum sued for. Therefore the defendant was fully apprized of what plaintiffs were claiming, and the jury could, by a simple mathematical computation, arrive at a correct conclusion. Such being the case, the verdict was not excessive unless the jury made an error in figuring the interest. We have not examined for the purpose of determining just what the interest on the different sums amounted to from the date they fell due until the time of the verdict, but if there was an excess of interest allowed, the plaintiffs below should be directed to file a remitter.

5. Counsel for appellant insist that interest should be computed at 6 per cent, as that is the law of the State of New York, the place where the contract was made. Six per cent may be the rate of interest in the State of New York, but, if so, counsel should have plead the statute. In the absence of such pleading and proof, we will presume that the rate of interest in the State of New York is the same as in Oklahoma. (Rec., p. 106–110 )

From the judgment of the Supreme Court of Oklahoma, Holloway brings the case to this court by writ of error, and has assigned the following errors :

First. The court erred in holding, after finding that the instructions as to what constituted residence within the meaning of the attachment laws of the Territory of Oklahoma, numbered eight and eleven, were erroneous, that it was harmless error by reason of the fact that there was an allegation of fraudulent disposition of property in the affidavit of attachment, and that this was sufficient to support the judgment of the court.

Second. The court erred in holding that it was not an abuse of judicial discretion for the court below to submit special findings to the jury with reference to fraudulent disposition

of property, there being no evidence of such fraudulent disposition of property offered on the trial of the case below, and none contained in the record.

Third. The court erred in holding and affirming the judgment of the court below after finding that the following instruction, numbered 12, to wit: "You need not be unanimous in determining what your verdict shall be; nine of you can determine upon a verdict," was not reversible error, for the reason that it did not appear from the record that only nine of the jurors found a verdict, and the court was given no opportunity by motion for a new trial to correct this ruling, and that therefore it was harmless error.

Fourth. The court erred in affirming the opinion of the lower court giving judgment for more than asked for in the complaint of defendants in error. (Rec., pp. 1–2.)

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## ARGUMENT.

The territorial Supreme Court held that the district court erred in its instructions to the jury upon the question of non-residence: that it erred in admitting the depositions of Dunham, Dutcher, Walker and Davis; and that it erred in the 12th instruction which is as follows: "You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict."

The first two said errors, the court held harmless, and the last it held that "no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors."

### I.

We think it clear that the trial court did err in its instructions to the jury upon the question of non-residence. The proof is clear and undisputed that Holloway had transferred his entire mercantile business to Oklahoma from Texas, carrying with him all his merchandise; that he had not only made the move openly, but had given actual notice thereof to Dunham, Buckley & Co., who had written him approving the

move. Holloway was actually residing at Oklahoma, and engaged in carrying on his mercantile business in the usual and ordinary way. He had put himself on a footing with other residents and merchants of Oklahoma, and he had the right to demand and receive like immunities. He was there in person, and had his property there, subject to the demands of creditors, just as other merchants of Oklahoma. He was served personally with the summons to answer the ordinary suit, and also with the writ of attachment.

That Holloway had acquired a residence in Oklahoma is unquestioned, and it does not matter whether he intended it to be permanent or not, for in order to make him in law a resident of Oklahoma, in contemplation of the attachment statute, it was not necessary that he should have abandoned the *animus revertendi* to his former residence. (*McKierman* v. *Massingill*, 6 S. & M. (Miss.), 375; *Alston* v. *Newcomer*, 42 Miss., 186, 192; *Morgan* v. *Nunes*, 54 Miss., 308.)

He might have retained a domicile at Ft. Worth, Texas, and his family might have continued to occupy his domicile there, but that would not have prevented his becoming a resident of Oklahoma. (*Wells* v. *People*, 44 Ill., 40; *Nailor* v. *French*, 4 Yeates, 241; *Farrow* v. *Barker*, 3 B. Mon., 217; *Thompson's Case*, 1 Wend., 43; *Lyle* v. *Foreman*, 1 Dallas, 480; *Reed* v. *Ketch*, 1 Philadelphia, 105; *Haggart* v. *Morgan*, 1 Selden, 422; *Briggs* v. *Rochester*, 16 Gray, 237.)

While Bradley testified that Holloway stated that he expected at some time to return to Texas, yet Holloway denied that he made such statements, and in this he is corroborated by many circumstances and facts fully proven by other witnesses.

The eighth instruction declared to the jury that "though you may believe from the evidence that the defendant came from the State of Texas, and *located* in Oklahoma City in, or about September, 1891, and here engaged in business in the selling of goods, wares and merchandise, yet this of itself does not constitute him a resident of the Territory of Oklahoma To constitute him a resident of Oklahoma Territory he must,

in addition to having *moved here and engaged in business*, have determined to made this, Oklahoma Territory, his permanent residence, and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there, nor at the time of the issuing of the writ of attachment herein, intend to make Oklahoma Territory the place of his permanent residence, *or if he was undetermined as to whether or not he would make* Oklahoma Territory the place of his permanent residence * * * then in that event he was a non-resident," etc. Boiled down, that simply means that if Holloway was not then determined to reside the remainder of his life in Oklahoma, he was not a resident there at all.

Assuming that the 8th and 11th instructions of the trial court on the question of non-residence, were erroneous, to what extent may they have reasonably influenced the mind of the jury so as to affect their verdict on the charge of fraudulent disposition of his property by the defendant?

He was merchandising at Ft. Worth, Texas, when he is alleged to have incurred the debt for which he was attached; he had taken his stock of goods out of the State, and removed them to Oklahoma Territory, where he was selling them, but in the ordinary course of trade. Is it not reasonable to suppose that when under the instructions of the court, the jury found as a fact that the defendant was liable to attachment as a non-resident, that they should couple with the charge of his fraudulently disposing of his goods, the fact that he, a resident of Texas, had brought his goods to Oklahoma, and that they should conclude that the bringing of his stock of goods from Texas to Oklahoma, was but a component part of a fraudulent scheme to sell and dispose of his property, with the intent to cheat and hinder and delay his creditors?

The jury had before them the undisputed fact that the defendant had only very recently brought his entire stock of goods from Texas to Oklahoma, and under the erroneous instructions of the court, they found as a fact that he had not

become a resident of Oklahoma, but remained in law a resident of Texas, they could, therefore, reasoning from those facts, doubtless very easily reach the conclusion that the removing his goods from Texas to Oklahoma was for the purpose of perpetrating a fraud on his creditors. It is human nature for men, when convinced of the truth of one charge laid against another, to more readily accept the truth of a second charge. Such must have been the fact in this case, for when we examine the record, we find there is absolutely no evidence sufficient to establish the charge of fraud against the defendant. He had notified the plaintiffs of his move to Oklahoma, and they had approved it, by writing him under date of September 25, 1891, about one month prior to the institution of the suit, that they had "no doubt that it was a good move." (Rec., p. 87). He had left Ft. Worth because there had been a number of large stocks of goods of merchants who had failed thrown on the market at reduced prices, such that he could not compete with. He frankly informed Bradley, the representative of Dunham, Buckley & Co., that he "hadn't any money" (Rec., p. 33), and that at that time the only thing he had which was immediately available for payment of debts, was some lands in Indiana and Kansas, and that he would give these in payment or settlement of the account. He declined to give a mortgage on the lands, but said "he would give the lands for the debt" (Rec., p. 33); and at another time Holloway told Bradley that he "could take the lands or else must wait until he could pay the debt. (Rec., p. 34.)

Holloway testified that all the goods sold by him were sold in the legitimate course of trade (Rec., p. 86), and this is not disputed. There is no testimony at all even tending to show that he was disposing of his goods or any other property, otherwise than in the usual way of trade.

There is not a single iota of testimony in the record even tending to prove that Holloway was "about to sell, convey or otherwise dispose of his property subject to execution with the fraudulent intent to cheat, hinder and delay his creditors," and hence we conclude that the jury must have been influenced in the finding of their verdict on the charge of

fraudulent disposition by the defendant of his property, by their belief from the evidence under the erroneous instructions of the court, that the defendant was not a resident of Oklahoma.

Not only was the jury misled by the erroneous instructions of the court upon the question of non-residence, but their minds were no doubt confused by the immense volume of depositions and exhibits, covering in the record 37 pages (Rec., pp. 37-74), all of which were erroneously admitted by the trial court.

Chief Justice Marshall, speaking for this court in *Etting* v. *The Bank of the U. S.*, 11 Wheat, 59, said, "If the Judge proceeds to state the law, and states it erroneously, *his* opinion ought to be reviewed, and if it can have had *any* influence on the jury, their verdict ought to be set aside."

An instruction to a jury based upon a theory unsupported by evidence, and which *may have* misled the jury to the injury of a party litigant, is sufficient to justify a setting aside of their verdict. (*Davis* v. *Patrick*, 122 U. S., 133.) In *Thacher* v. *Jones*, 31 Me., 528, it is said, "It should appear to be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial." In *Davis* v. *Davis*, 1 Pick., 206, C. J. Parker, speaking for the court said: "The court are all satisfied there must be a new trial, on account of the opinion expressed by the judge to the jury, that the guardian might be cited in the probate court to settle a new account, notwithstanding the proceedings which had taken place with respect to the decree in question. That opinion was certainly calculated to have an effect upon the minds of the jury and to render them more willing to return a verdict against the plaintiff than they otherwise might be." So in the case at bar, when the jury were able to say under the erroneous instructions of the trial court that which they could not have said under correct instructions, namely, that the defendant was a non-resident, it "was certainly calculated to have an effect upon the minds of the jury, and to render them more willing to return a verdict against the defendant "than they otherwise might" have been.

In *Wardell* v. *Hughes*, 3 Wend., it is said: "Inasmuch as the verdict *may have* resulted from the error of the judge * * * a new trial ought to be granted."

In *Gillespie* v. *Gillespie*, 2 Bibb., 98, it is said: "If the court give erroneous instructions to the jury, and the verdict corresponds with the instructions, the verdict must be set aside, notwithstanding the evidence would have warranted the finding; for the jury *might have found differently* but for the improper instructions of the court."

This court said in *Beaver* v. *Taylor*, 1. Wall., 637: "The law as to instructions outside of the facts of the case, or involving abstract propositions, is well settled. If they *may* have misled the jury to the injury of the party against whom their verdict is given the error is fatal," citing *Clarke* v. *Dutcher*, 9 Cow., 674.

II.

The 11th error assigned in the Territorial Supreme Court (Rec., p. 98), and the third error assigned in this court (Rec. p. 2) are to the giving of the 10th instruction by the trial court, which is as follows:

10th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances which you may take into consideration, determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder, or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff on the ISSUE in attachment.

As stated above, there was no evidence before the jury, that the defendant "was not appropriating the proceeds of the sales (of his goods and property) to the payment of his debts, or that he "was refusing to pay his debts;" not one fact was introduced in evidence that tended in the slightest degree to prove that Holloway was selling or disposing of any property with intent to defraud his creditors.

The court, by the 10th instruction, told the jury that if they

found that the defendant "was disposing of his property with a fraudulent intent," "you will find for the plaintiffs on the issue in attachment." The ***attachment issue*** was formed on the affidavit for attachment, which included the two grounds, non-residence and fraudulent disposition of property, and the traverse; when, therefore, the court instructed the jury that if they found that the defendant "was disposing of his property with a fraudulent intent" they "will find for the plaintiffs on the *issue* in attachment," the jury were in effect instructed that if they believed from the evidence that one ground of the attachment had been made out, that they should find both grounds established.

The court had in the 3rd instruction informed the jury that they were trying two issues:

"1st. Whether or not the attachment herein shall be sustained."

"2nd. The matter of indebtedness."

To say the least of it, the 10th instruction was confusing and calculated to mislead the jury, especially in view of the fact that there was no sufficient evidence before them to justify the giving of the instruction.

III.

The 3rd error assigned in this court is to the 12th instruction to the jury, which is as follows:

"You need not be unanimous in determining what your verdict will be; nine of you can determine upon a verdict."

The court also instructed the jury as follows, how their verdict should be signed: "Your foreman will sign each of the verdicts, and also this special verdict when you are agreed." (Rec., p. 98).

The statute of Oklahoma (1890) then in force, provided that "The number of jurors in a civil action shall not exceed twelve nor be less than three. The parties may determine the number of jurors by agreement, and in case of their disagreement the number shall be twelve." (Sec. 6, Art. 18, Chap., 70, p. 840.)

"When the jury have agreed upon their verdict, it must be reduced to writing and signed by the foreman. If four jurors dissent from the verdict, they shall again be sent out to deliberate." (Sec. 25, p. 843.)

It will be observed that the statute required that the verdict should be signed by the foreman, whether unanimous or only nine agreed to it. No mode was provided by the statute or the instructions of the court for the return of a verdict when only nine agreed to it, different from that when all twelve agreed. In this respect, the statute is different from that of the Territory of Utah, passed on by this court in *American Publishing Co.* v. *Fisher*, 166 U. S., 464, and *Springville* v. *Thomas*, ib., 707, where a somewhat similar territorial statute was declared unconstitutional and void. The Utah statute, as also the instruction of the court to the juries in said cases, required that the jurors who agreed to the verdict should sign it, by which means the court and counsel were advised whether the verdict was unanimous or not. But the Oklahoma statute, and the instruction of the court in this case, required that the verdict should be signed by the foreman only.

The statute upon which the instruction was based, was violative of the constitution as declared by this court in the several cases in 166 U. S., *supra*, but the Territorial Supreme Court, said "no exception was properly taken to it at the time it was given and the record fails to show that the jury was polled, or that the verdict was returned by a less number than twelve jurors." (Rec., p. 109.)

The Territorial Supreme Court considered and held sufficient other exceptions taken at the same time and in the same manner that the exception to this instruction was taken. The court certifies in the bill of exceptions that "to the giving of which instructions and each of them the defendant at the time excepted." (Rec., p. 26.)

The Territorial Supreme Court in its opinion says: "It is insisted by appellee that under the code, 1890, the appellant has not properly saved *his objections to the instructions*." (Rec., p. 107.) Then proceeding to discuss the question as to

whether the exceptions "to the instructions" had been by the defendant properly saved, it reaches a conclusion that the exceptions had been sufficiently saved (Rec., p. 108), and in this we think the court did not err. The statute (1890) provided:

4565, § 19. "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write on the margin, or at the close of such instruction, "refused and excepted to," or "given and excepted to," which memorandum shall be signed by the judge and dated."

That statute was substantially complied with. The whole record of this case went up to the Oklahoma Supreme Court on appeal; everything was certified up, all the pleadings, all the testimony, all the rulings of the court, all the instructions given, as also those refused, the final judgment, and the whole is now before this court.

An attachment at law is wholly statutory and in derogation of the common law, and its provisions, therefore, guarded and restricted to the precise letter of the statute. The proceeding is considered as a violent and extraordinary special remedy, and the plaintiff has universally been held to a strict compliance with all the provisions of the statute. The court has no jurisdiction under its general powers, and the power of the court to act must appear on the face of the proceedings.

The record shows that the defendant requested a jury, and neccessarily that meant a jury of 12 men, and had a right, under the Constitution of the United States, to demand that the verdict should be the unanimous verdict of the entire 12. When the court instructed the jury that they need not be unanimous in their verdict, but that nine could determine the verdict, it was proceeding not in accordance with "the law of the land." When the cause was turned over to the jury to determine the facts under the instructions of the court as to the law, then it was that the jury had exclusive jurisdiction of the case, but without any authority to act except unanimously. And yet the jury was instructed that nine of them could agree upon a verdict, and that the verdict need only be signed by the foreman. This was not "due process of law."

The Constitution of the United States secures to the citizen of the territories immunities against the deprivation of his property except by "due process of law."

It is said, "due process of law means, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." It was said in *Ziebold's Case*, 19 Reporter, U. S. Cir., 472, that "due process of law" and "law of the land," have a broad and comprehensive meaning, and originated in that great bill of rights, Magna Charter, and operate as a restriction on each branch of civil government." "Due process of law" in judicial proceedings implies jurisdiction and trial; it means a course of legal procedure according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter."

In this case, the questions of fact were to be passed upon by the jury, and if the jury was not constitutionally organized, or if there were conferred upon it either greater powers than the constition allowed, or it was limited in the exercise of its constitutional powers, in either event the finding of the jury was not in accordance with the "law of the land." The highest rights of an American citizen are those conferred by the constitution, and whenever those rights are infringed upon, the courts of the country are not disposed to indulge in too great strictness as to the manner of bringing the questions before them, but, as we understand the disposition of this court, it is to come promptly to the protection of the citizen, whenever he has been deprived of any of his constitutional rights and privileges. In this case, nine of the jurors might have agreed to the general verdict, and nine might have responded affirmatively to the first question, which might have included only six of the nine who agreed to the general verdict; and then nine might have responded to the second question, and that nine might not have included all

that responded affirmatively either to the general verdict or to the first question, and hence, since under the instructions of the court, in accordance with the statute, the verdicts were only to be signed by the foreman, it is impossible to tell how many or which ones of the jury agreed to either of said verdicts.

A verdict is "the unanimous decision made by a jury and reported to the court, on matters lawfully submitted to them in the course of the trial of a cause. (Bouvier Law Dictionary.)

It cannot be said that the cause is lawfully submitted to the jury when it is submitted to them in such a way that nine of their number may determine a verdict. In the case of *Biggs* v. *Barry*, 2 Curt., 259, the jury found generally for the plaintiff, but upon being questioned, it appeared that some considered the plaintiff entitled to recover on one ground, and some on another; for this reason the verdict was set aside. The record should always make it affirmatively appear that there was a jury of twelve men, and that the verdict returned into court was the unanimous finding of the jury. These are jurisdictional matters, and jurisdiction must always affirmatively appear. It never devolves upon the defendant to show that the court did not have jurisdiction, but it devolves upon the plaintiff to show that the court had full jurisdiction and that the cause was determined in accordance with the law of the land, and when it does not so appear any judgment rendered is *coram non judice*.

## IV.

Among other errors assigned in the Territorial Supreme Court were the following:

19th. The complaint and exhibits thereto attached and the evidence in the case show that the contract and purchase of the goods, wares, and merchandise was in the State of the New York, and governed by the laws of the State of New York, under which laws only six per cent interest can be allowed and collected, and the court erred in allowing interest on said account at the rate of seven per cent per annum.

20th. The court erred in rendering judgment for more than the amount claimed in the complaint and interest thereon and more than the evidence and accounts filed as exhibits show to be due.

21st. Said judgment is not sustained by the proof, nor authorized by the complaint nor evidence in the case, and is erroneous.

22d. The court erred in allowing any interest on said account, as no demand of payment was shown, and until such demand no interest under the laws of New York accrued. (Rec., p. 93.)

The above are comprehended in the fourth error assigned in this court, which is:

"The court erred in affirming the opinion of the lower court giving judgment for more than asked for in the complaint of defendants in error. (Rec., p. 2.)

The judgment asked in the petition, was for $5,004.58, "with interest thereon, according as the same may *appear to be due from the items of said exhibit*, at the rate of seven per cent per annum." (Rec., p. 5.)

It will be remembered that the only competent or legal testimony introduced that tended to prove the account sued on was the deposition of Bradley, and that was most meager. The contracts sued on were made in New York; there is no proof whatever upon the question of interest, whether there was a contract to pay interest or whether it was customary to charge interest, or if any interest was to be charged, what the rate should be. The subject of the interest does not seem to have been referred to at the trial, until the court instructed the jury as follows:

9th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiffs for goods, wares, and merchandise purchased of plaintiffs by defendant, as charged in the complaint, then you will find for the plaintiffs in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent per annum, from March 23rd, 1891, to the present. (Rec., p. 98.)

The first *item* in the account sued on shows that it was due 60 days after December 31, 1890, and that the last item was

due 4 months from May 6, 1891, and yet the court instructed the jury that they should charge interest on *all* the items from March 23, 1891. There are 19 *items* charged in the account sued on, that did not become due until from the 20th of April, 1891, to the 6th of September, 1891. See account Rec., p. 6.

There was no testimony whatever as to when the account did become due, but it shows upon its face, that a very large portion of it was not due March 23, 1891. Without any testimony whatever, the trial court arbitrarily fixed the rate of interest, and the time from which interest should be charged.

The instruction of the court as to the time from which interest should be charged, was in conflict with the demand for judgment made in plaintiff's petition, in this, that they asked "interest according as the same may appear to be due *from the items* of said exhibit," that would have given them interest on the last item of $393.52, from September 6, 1891, whereas the court allowed interest on the whole account from March 23, 1891. The last item in the account was due four months from May 6, 1891. There is no question but the verdict of the jury was for an amount greater than was legally due plaintiffs, even allowing interest at 7 per cent.

At common law interest was not allowed in any case.

Interest can only be allowed upon a contract, expressed or implied, and as authorized by statute, Viner's Abridgment, title Interest. Chitty on Contracts. *Ill. Cent. R. R.* v. *Cobb*, 83 Am. Rpt., 244; *Clay Co.* v. *Chickasaw Co.*, 64 Miss., 534.

A contract to pay interest must, of course, be proven as any other contract.

Chadbourne *v.* Hanscom, 56 Me., 554.
Knox *v.* Jones, 1 Dallas, 193.

In general, interest is not allowed upon unliquidated accounts, in the absence of an agreement, express or implied, to pay it. *Curtis* v. *Innerarity*, 6 How., 146; *Swett* v. *Hooper*, 52 Me. 54; *Chicago* v. *Tibbetts*, 104 U. S., 120. Upon liquidated accounts interest is allowed only after the correctness of the account has been acknowledged, or demand made. *Newell* v. *Griswold*, 6 Johns., 45.

There is no proof that Holloway ever admitted the correctness of the account until October 26, 1891, if indeed he admitted it then.

The rate of interest is according to the law of the place of the contract, unless stipulated differently in the contract. Here the contract was in New York, and the rate is by statute of that State fixed at 6 per cent.

But the Territorial Supreme Court said: "Six per cent, may be the rate of interest in the State of New York, but if so, counsel should have plead the statute. In the absence of such pleading and proof, we will assume that the rate of interest in the State of New York is the same as in Oklahoma." The defendant had plead the general issue; he had denied in due form of law every material allegation in the petition of plaintiffs, and we are at a loss to understand why any other pleading was necessary. The defendant was not defending against a usurious contract, but he denied the contract as a whole—he denied that he ever undertook or promised to pay 7 per cent. interest. The state of the pleadings were such when the case went to trial, that the burden was on the plaintiffs to establish by competent proof every material allegation in their petition, among which was the charge for interest, at the rate of 7 per cent.

When the place of payment is not expressed in the contract, the law will presume that it was to be paid at the place where it was made, and the law of that place will govern. *Lynes* v. *Mack*, 19 Ind., 223; *Chase* v. *Dow*, 47 N. H., 405.

In the absence of all proof whatever upon the question of interest, either as to the rate or from what time it should have been charged, no interest should have been allowed, and the giving of the 9th instruction of the trial court was error, and the verdict of the jury was in excess of what under any circumstances should have been allowed.

V.

## CONCLUSION.

In conclusion we respectfully submit that a judgment in attachment should not be permitted to stand, when it rests on

a record so full of errors, and so exceedingly barren of proof.

The amount of the judgment is clearly excessive; the grounds of the attachment are not sustained by sufficient proof, and there is nothing in the record to show that the verdicts of the jury were concurred in by all the jurors.

That the defendant was not in a condition at the time he was attached and his business closed up to pay all his debts right then is not denied, but may be admitted without shame or humiliation, and within itself was no ground for attachment. He, like thousands of others, had been overtaken by the stress of hard times, and was confronted by exacting creditors. He was engaged in one of those great struggles that so ofteu come to the country merchant. Business was dull and sales were difficult, but no where in the record is there a single particle of testimony that tends in the slightest degree to indicate that he had been guilty of the smallest act not compatible with the highest integrity. He had promptly notified plaintiffs of his move to Oklahoma, and when their representative, Mr. Bradley, went there, the defendant took him through his store, showed him his stock, and fully and truthfully explained his condition. He informed Mr. Bradley of his lands that he owned in Kansas, and Indiand, told him where they were located, and their condition, and offered to give them in payment of his debt. Of course, he could not afford to destroy his stock by selling plaintiffs a large part thereof; that would have ruined his business, and rendered comparatively valueless the remaining portion, but he was ready and willing to let them take his lands. As we see and understand the record, a more unjustifiable legal proceeding was scarcely ever instituted against a man, than was the attachment in this case. Nor is it often that a record of a trial of the importance of this, is seen, in which so little regard was paid to the ordinary principles and rules of legal procedure.

Respectfully submitted,

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No. 247.

FILED.
MAY 2 1898
JAMES H. McKENNEY,
CLERK

Brief of Dudley & Michener for D. C.

# SUPREME COURT

Filed May 2 1898.

## UNITED STATES.

October Term, 1897.

No. 247.

JOHN R. HOLLOWAY, Plaintiff in Error
vs
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB and WILLIAM E. WEBB.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief on Behalf of James H. Dunham, William T. Buckley, Charles Webb and William E. Webb,

*Defendants in Error.*

M. M. DUDLEY & MICHENER, WASHINGTON, D. C.,
AND
SELWYN DOUGLAS AND MACGREGOR DOUGLAS,
OKLAHOMA CITY, OKLA.
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OKLAHOMA CITY, OKLA.
ATTORNEYS FOR DEFENDANTS IN ERROR.

## STATEMENT.

This case come to the Supreme Court of the United States by writ of error from the Supreme Court of the Territory of Oklahoma.

The transcript of the Record in this case, as sent up by the Clerk of the Supreme Court of the Territory of Oklahoma, is illy arranged and is not in chronological order, which is probably the fault of Counsel for Holloway in the preparation of the original bill of exceptions in the District Court of the Third Judicial District of the Territory; but it shows:

That, on the 31st day of October, 1891, the defendants-in-error in this court, as plantiffs in the territorial District Court, filed their complant in the District Court of the Third Judicial District of the Territory of Oklahoma sitting within and for the County of Oklahoma, praying for judgment against Holloway, defendant in said District Court, on an account, in the sum of $5,004.58, with interest, as set forth in the complaint, accompanied by affidavit and undertaking in attachment.

*Transcript of Record, pages 5 to 9.*

On the 28th day of November, 1891, J. R. Holloway, defendant in lower court, plaintiff-in-error here, filed his answer,—a general denial,—to said complaint.

*Transcript of Record, pages 9 and 10.*

Afterwards, on November 7th, 1891, Holloway filed two more general denials to the complaint, the reason for which additional answers does not appear.

*Transcript of Record, page 13.*

And afterwards, on November 23rd, 1891, Holloway filed a fourth answer to complaint, it also being a general denial.

*Transcript of Record, page 14.*

On November 14th, 1891, Holloway filed a notice of a motion to discharge the attachment in said cause, but we do not find that any such motion was filed on that day or at any other time, unless it is claimed that the answer of Holloway to the attachment proceedings is or was intended for such motion,—which answer was filed on November 23rd, 1891.

*Transcript of Record, pages 14 and 15.*

On November 25th, 1891, a fifth answer on behalf of Holloway to the complaint was filed, signed and verified by W. S. Holloway, as agent for defendant; and, on the same day, the plaintiffs, Dunham et al., filed a motion to strike from the files this last answer, but the record does not show that the Court passed upon such motion.

*Transcript of Record, pages 16 and 17.*

On January 16th, 1892, the attorney of Dunham; et al., plaintiffs in the lower court, served notice in writing upon Holloway that the deposition of J. H. Bradley, as a witness for Dunham et al., in said cause would be taken as per notice, on the 26th day of January, 1892.

*Transcript of Record, page 30.*

The deposition of said Bradley was accordingly taken pursuant to the notice, and filed in said cause in the said District Court on January 30th, 1892, thereafter, with certificate thereto of S. A. Emanuel, Notary Public.

*Transcript of Record, pages 31 to 36.*

The depositions of James H. Dunham and others were also taken on behalf of plaintiffs below, upon notice duly given to Holloway, and were filed in said cause, with a certificate of the notary, in February, 1892.

*Transcript of Record, pages 34 to 36, inclusive.*

On June 13th, 1892, said District Court overruled Holloway's motions to suppress depositions for plaintiff, but the journal entry on page 17 of the record, overruling same does not apply to deposition of J. H. Bradley, nor is there any order of the Court or other entry to that effect set forth in the transcript.

*Transcript of Record, page 17.*

A jury was empaneled, and the issues both upon the question of indebtedness and upon the attachment were submitted to the jury, and upon June 15th, 1892, the Court gave its instructions to the jury, and submitted to the jury two special questions, to be answered specially, yes, or, no, by the jury; and to the giving of the instructions, Holloway, by his counsel, excepted generally.

The instructions of the Court, together with the special questions submitted to the jury, with the answers of the jury thereto appended, appear in the transcript.

*Transcript of Record, pages 24, 25, 26.*

Certain instructions were also requested by defendant Holloway, and refused by the Court, to which refusal Holloway generally excepted.

*Transcript of Record, pages 26, 27.*

Thereafter, on June 16th, 1892, the jury returned into Court their verdict upon the attachment issues, and also separately upon the question of the alleged indebtedness of the defendant, Holloway, to the plaintiffs upon both issues. And the jury also returned their answers and special findings to the two questions submitted by the Court.

*Transcript of Record, pages 11, 12.*

Thereafter, on the same day, the defendant filed his motion for a new trial, which was overruled by the Court, to which ruling defendant Holloway excepted.

*Transcript of Record, pages 27. 28.*

Thereafter, on the same day, the Court rendered its judgment upon the verdict of the jury in favor of the plaintiffs, Dunham et al., and against said defendant, Holloway.

*Transcript of Record, pages 11, 12.*

Thereafter, the defendant, Holloway, tendered his bill of exceptions, and the same was presented to the trial Judge on June 25th, 1892, and Holloway thereupon took the case upon said bill of exceptions, to the Supreme Court of the Territory of Oklahoma.

*Transcript of Record, page 102.*

A brief statement of the case by Hon. Frank Dale, Chief Justice of the Supreme Court of Oklahoma, is set forth on pages 102 and 103 of the printed Transcript of Record, as the same appears on file in the Supreme Court of the United States.

The assignments of error filed by Holloway in his motion for new trial are also briefly and correctly summarized in said statement.

*Transcript of Record, pages 102, 103.*

This statement of the case and summary of assignments of error, made by Chief Justice Dale, is followed by the first opinion of the Oklahoma Supreme Court, in said cause, in which said first opinion said Court found against Dunham et al., on the mistaken assumption that no proof of the indebtedness of Holloway had been made in the Court below, outside of the depositions of James H. Dunham, John T. Dutcher, Henry W. Walker and Edwin A. Davis, suppressed by the territorial Supreme Court.

*See Transcript of Record; first opinion of the Oklahoma Supreme Court; pages 104, 105,—last paragraph of opinion.*

The territorial Supreme Court was mistaken in this, its first opinion, as to the proof of indebtedness. The deposition of J. H. Bradley, a witness for Dunham, et al., *which deposition was not suppressed,* clearly and distinctly proves the indebtedness of Holloway to Dunham et al., and, upon motion for rehearing by Dunham et al., filed in the territorial Supreme Court, said Court reviewed the evidence, set aside its first opinion, and affirmed the decision of the lower Court in favor of Dunham, et al.

*See depositions and testimony of J. H. Bradley, in Transcript of Record, pages 31 to 35 inclusive, and particularly the last two or three paragraphs of said testimony.*

*See also first paragraph of final opinion of the territorial Supreme Court, on rehearing,—Transcript of Record, page 117.*

The final decision of the territorial Supreme Court in favor of Dunham et al., and setting aside its first decision, was rendered on July 27th, 1895.

*Transcript of Record, pages 106 to 110 inclusive, and page 117.*

Thereafter, Holloway, by writ of error, brings the case into the Supreme Court of the United States for review.

The assignments of error are set forth and stated at length in Holloway's motion for new trial, as shown on Transcript of Record at pages 27 and 28, and are as follows:

1. The Court erred in refusing to grant the defendant an early hearing on his motion to discharge the attachment.
2. The Court erred in ordering a trial of the question of the validity of the attachment to a jury.
3. The Court erred in requiring a trial as to the validity of the attachment in conjunction with the trial as to the merits on the complaint.
4. The Court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

5. The Court erred in overruling defendant's motion to suppress the deposition of James H. Dunham, J. T. Dutcher, Wm. H. Walker and Edwin A. Davis.

6. The Court erred in allowing the exhibits attached to the deposition of James H. Dunham, J. T. Dutcher, W. H. Walker and Edwin A. Davis to be read in evidence.

7. The Court erred in refusing to allow the cross-interrogatories 2, 3, and 4 of the depositition of A. B. Smith to be read in evidence.

8. The Court erred in refusing to allow the crosss-interrogatory of the deposition of James Riley to be read in evidence.

9. The Court erred in refusing to allow the witness, O. A. Kincaid, and Mrs. White to testify as to what defendant said to them in his efforts to procure a home for his family and their replies thereto.

10. The Court erred in refusing all of the instructions asked for by the defendant.

11. The Court erred in refusing instructions 3 and 4 asked for by defendant.

12. The Court erred in giving instructions numbered 6, 8, 9, 10 and 1.

13. The assessment of the amount of recovery is erroneous, being too large.

14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

15. The verdict of the jury on the attachment issue in contrary to law.

16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law.

## BRIEF AND ARGUMENT.

The first, second and third assignments of error may properly be considered together, and, at the outset, we desire to call the attention of the Court to the fact that plaintiff-in-error, Holloway, failed to file any motion in the lower court to discharge the attachment, and the record fails to disclose or set forth any such motion, unless Holloway's answer in attachment proceedings, found on page 15 of the printed transcript, can be termed such a motion, which is hardly possible; nor does the record show that any such motion was heard or acted upon, nor does the transcript show that any order or ruling of the court on any such motion was made.

But, suppose such a motion had been made and overruled by the Court, such order of the Court would have been the proper one.

The law under which the attachment was sued out was adopted from the Indiana Code, and the courts, in construing that statute, uniformly hold that proceedings in attachment are merely auxiliary to the main action, and that both the principal and the attachment proceedings must be tried together.

*Work's Indiana Practice, 2nd Ed., Vol. 2, Sec. 1328.*
*Waples on Attachment, pages 426, 427.*
*Foster vs. Dreyfus, 16 Ind. 158.*
*Bradley vs. Bank, 20 Ind. 528.*
*Fork Co. vs. Lukrus, 38 Ind. 438.*

Therefore, the cause having been submitted to the jury, both the isssue upon the indebtedness and the attachment issues were properly submitted to the jury.

The fourth assignment of error is that the Court erred in overruling the motion to suppress the deposition of J. H. Bradley.

We submit that the Court, in overruling such motion, did not err.

The notice given to plaintiff-in-error is set forth in full on page 30 of the printed Transcript of Record, together with the acknowledgment of service thereof and receipt of copy of the notice by plaintiff-in-error and his attorneys.

*Transcript of Record, page 30.*

In that notice, the title of the court and venue were properly given, the style of the cause was correctly stated, the time and place for taking the depositions were accurately and distinctly named, the name of the notary and the name of the witness were both set out in the notice. The notice could not have been made more complete. It was dated, and the acknowledgment of service thereof by Holloway and his attorneys shows the same date as the notice, and that ample time was given all parties to attend at the taking of the deposition.

*Transcript of Record page 30.*

The first principal objection urged to this deposition of J. H. Bradley is that it was taken in violation of the provisions of sections 4456,4465 and 4486, of the Oklahoma Statutes (1890). But the provisions of section 4456 are fully complied with, as above shown, because that section simply declares what the notice shall contain, to-wit:

"First.—The cause or matter in which the deposition is to be used.

"Second.—The court or tribunal in which the trial is to be had.

"Third.—The time and place of taking the deposition, and the names of the witnesses."

*Oklahoma Statutes of 1890, Sec. 4456.*

Section 4465 of the same statute was also complied with in the taking of Bradley's deposition.

The section is as follows:

"Sec. 4465.—The deponent shall first be sworn by the officer to testify to the truth, the whole truth and nothing but the truth, relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and *by the officer* or parties afterward, if they see cause."

The provisions of the above section were fully complied with. The deponent was properly sworn, the examination was held at the time and place and before the notary named in the notice, neither party was present or represented by attorney at the taking of the deposition, and all the questions were asked by the notary, as may properly be done under the provisions of section 4465.

*Transcript of Record, page 35.*

As to section 4486, we submit that its provisions do not apply in the matter of taking this deposition, and if they did, there is nothing to show that they have been violated.

The second principal objection to the deposition of Bradley is that:—The officer's certificate does not show that the deposition was read over to the witness before he signed the same."

This is puerile. The statute which provides what the notary's certificate shall contain is particularly concise and clear. It is contained in Section 4467 of the Oklahoma Statutes of 1890. and is as follows:

"Sec. 4467.—The officer shall annex a certificate to the deposition, stating the following facts:

"First.—That the deponent was sworn according to law.

"Second.—By whom the deposition was written, and if written by the deponent or some disinterested person, that it was written in the presence and under the direction of the officer.

"Third.—Whether or not the adverse part attended.

"Fourth.—The time and place of taking the deposition. and the hours between which the same was taken, and the officer shall sign and attest the certificate and seal the same, if he have a seal of office."

*Oklahoma Statutes (1890), Sec. 4467.*

The certificate of the notary fully satisfies every requirement of the statute. The clear presumption is that the deposition was read to the witness before he signed it. The statute does not require that the certificate should show that fact, and the Court will presume that what should have been done was done.

*Oklahoma Statutes (1890), Sec. 4467.*

Another objection is that: "It appears from the record that written interrogatories were placed in the hands of the officer who took the depositions and that neither defendant nor his attorneys were notified of this fact, etc."

*Transcript of Record, page 22.*

In reply to this, it is only necessary to say that the Record shows nothing of the sort. If it had been actually done, it would not have been improper.

*Work's Indiana Practice, 2nd Vol., Sec. 1241, p. 209.*

Still another objection is that: "The officer had no right to propound interrogatories, except as given in section 4465; and then only after the witness is examined by the party producing him, also after examination by the adverse party."

In reply to this objection we submit that:

"No deposition shall be suppressed for any informality therein, or in the taking thereof, unless such informality shall be prejudicial to the substantial rights of the party."

*Work's Indiana Practice, 2nd Vol., Sec. 1241.*
*Oklahoma Statutes (1890), page 826, Sec. 4475.*

The last objection in Holloway's motion to suppress Bradley's deposition is that: "The 5th interrogatory and all others were written by plaintiff's attorneys and secretly transmitted to the notary who took the deposition, in violation of section 4486 of the Oklahoma Statutes."

*Transcript of Record, page 22.*

In reply to this objection we have to say that there is nothing in the record to show the truth of the averment contained in the objection. There is nothing in the bill of exceptions, nothing in the certificate of the notary to show it. The Court will not assume it to be the fact.

The writers of this brief know nothing of the case except as the record here and in the Oklahoma Supreme Court discloses the situation.

But suppose it had been done for the guidance of the notary, it would have been proper, and no injury or injustice could have been done thereby to either party.

*Work's Indiana Practice, 2nd Ed., 2nd Vol., Sec.* 1241.

We therefore respectfully submit that the deposition of J, H. Bradley was properly taken and properly submitted as evidence to the jury, both on the issues of the debt and of attachment.

The fifth assignment of error in the motion for new trial filed by Holloway, is:

"That the Court erred in overruling Holloway's motion to suppress the depositions of James H. Dunham, J. T. Dutcher, William H. Walker and Edwin A. Davis."

*Transcript of Record, page* 27.

The Supreme Court of Oklahoma hold that these depositions of Dunham, Dutcher, Walker and Davis ought to been suppressed, and that the lower court erred in admitting them in evidence, but that the error was immaterial, as depositions referred only to the debt, and that the debt was clearly proven by the testimony of Bradley and not denied by Holloway, and that, therefore, the evidence contained in the depositions of Dunham, Dutcher, Walker and Davis was but cumulative.

In other words, under the pleading and the evidence of Bradley, coupled with Holloway's failure to deny the debt, —his more than tacit admission of the indebtedness,—the depositions of Dunham, Dutcher, Walker and Davis might well not have been offered or considered at all; and yet, upon the Bradley deposition and Holloway's admission, it would have been proper for the court to have directed the jury to

bring in a verdict for the plaintiff upon the question of the indebtedness.

The views of the Oklahoma Supreme Court upon this question are very clearly stated in the first opinion of that Court.

*Transcript of Record, page 104.*

Ordinarily, we should let a question of so small moment pass without further comment and agree that the view of the Oklahoma Supreme Court might be accepted, and that the depositions of Dunham, Dutcher, Walker and Davis might properly be suppressed as a matter of no importance. But the Supreme Court of Oklahoma, in its first opinion, evidently paid but slight attention to the record of the evidence in this case, because, in that opinion, that Court says: "That an examination of record discloses the fact that there is no evidence whatever showing any indebtedness on the part of Holloway to the plaintiff below, except such as appeared in the depositions of Dunham, Dutcher, Walker and Davis." As a matter of fact, clear and unmistakable proof of Holloway's indebtedness is shown in last paragraph of Bradley's deposition.

*Transcript of Record, page 35.*

And it was on account of that oversight by the Oklahoma Supreme Court that a rehearing was had upon the Court's having had its attention called to the matter, and the case finally decided by that Court in favor of Dunham et al.

For these reasons we feel impelled to urge that notwithstanding the view of the Oklahoma Supreme Court,—notwithstanding the fact that the question of the admission or

suppression of the Dunham, Dutcher, Walker and Davis depositions is of no importance,—as the defendants-in-error have made a clear case without them,—we wish to submit our reasons for thinking that the Dunham, Dutcher, Walker and Davis depositions were properly admitted by the lower court as evidence in the case.

The certificate of the notary, by its reference to the notice, shows when said depositions were taken. The notice served upon Holloway was that the depositions were to be taken before S. A. Emanuel, a notary public, at No. 10, Wall Street, New York City, in the State of New York.

*Transcript of Record, page 36.*

And the heading or caption of the depositions is as follows: "Depositions of witnesses taken before S. A. Emanuel, a notary public within and for New York County in the State of New York; in pursuance to the notice hereto attached."

*Transcript of Record, page 37.*

And, "Now on this 30th day of December, 1891, before me, the undersigned, S. A. Emanuel, a notary public within and for New York County, appeared J. H. Dunham," etc.

*Transcript of Record, page 37.*

So that the certificate with its references shows all the matters required. It shows that the taking of the depositions began December 30th, 1891, and were finished before five o'clock in the afternoon of that day. The date and seal and signature of the notary with the foregoing shows all the requirements of the statute to have been filled and met, and that Emanuel was a notary public at that time.

The failure of the notary to add to his certificate and signature the date of the expiration of his notarial commission is of no importance. In a state or territory where the law requires such addition and statement, its omission might subject the notary to prosecution for misdemeanor, but such an offense would scarcely justify the punishment of other people.

The seventh and eighth assignments of error in Holloway's motion for a new trial, complaining of the refusal of the Court to permit cross-interrogatories Nos. 1, 2 and 3 of the deposition of A. B. Smith and cross-interrogatory No. 1 deposition of James Riley to be read in evidence, may be considered together with the 9th assignment therein,—that the Court erred in refusing to allow A. O. Kincaid and Mrs. White to testify what Holloway had said to them in his efforts to procure a home for his family and what they said to Holloway in reply.

Such evidence, if admitted, would have been hearsay of the rankest kind. We do not care to discuss the proposition, especially as no exceptions were saved to the rulings of the court.

*Transcript of Record, pages* 82, 83, 88, 89.
*Opinion of Supreme Court upon rehearing.*
*Transcript of Record, page 107.*

The 10th, 11th and 12th assignments of error set forth in Holloway's motion for a new trial, concerning the giving and refusal to give instructions by the Court to the jury may be considered together; but for convenience, we propose to discuss, first, those given by the Court.

*Transcript of Record, pages 96 to 99 inclusive,*

There were two issues, as heretofore stated, submitted

to the jury,—*first*, the question of indebtedness, and, *second*, the issues in the attachment.

Upon the first of these, the Court could have properly directed the jury to find for the plaintiff and against Holloway, for the reason that the testimony of Bradley proves the indebtedness, and for the further reason that the plaintiff-in-error, Holloway (defendant in the District Court), does not deny his indebtedness to Dunham et al., but substantially admits it in his testimony.

*Transcript of Record, page* 86.

The transcript, at the page just cited, shows that Holloway's counsel asked him the following question:

"You did tell him (Bradley) that *you'd give lands in payment of the debt*, but you would not incumber them by a mortgage, did you?"

To this question Holloway answered: "*Yes, sir*; I'd make a deed straight to them."

Again Holloway's counsel called his attention to the testimony of Bradley in the following question:

"Mr. Bradley in his deposition also testifies that these different tracts of land to which you offered to make a deed, were all incumbered;—that was a fact was it?"

To this Holloway answered: "Yes, sir."

Counsel for Holloway then inquires:

"I will ask whether you didn't offer to clear the incumbrances of one 160?"

To this question Holloway answers: It—320; that is I told him I would pay off the incumbrance, and give a deed to him free of incumbrance."

*Transcript of Record, page 86.*

In view of the testimony of Bradley, which had been

previously offered in evidence, this testimony of Holloway is a substantial admission of his indebtedness, and he nowhere, in his testimony, so much as hints that the amount of the indebtedness as set forth in Bradley's deposition is not correct.

So that defendants-in-error were and are entitled to their money judgment against Holloway, and, *no matter what disposition might have been made of the attachment issues,—even had those issues been found in Holloway's favor, nevertheless, the money judgment would have had to stand in favor of defendants-in-error and against plaintiff-in-error, Holloway.*

Hence, our discussion and inquiry as to the correctness of the instructions given by the Court to the jury may be properly limited to the question of the attachment issues, and the application of the instructions to those issues.

In the affidavit for attachment filed against Holloway, in the lower court at the beginning of the action, two causes and grounds for attachment are specifically set forth,—*first*, that Holloway was *about* to dispose of his property, with the fraudulent intent to cheat, hinder and delay his creditors, —*second*, that Holloway is (was) a non-resident of the Territory of Oklahoma.

These were the only controverted questions in the case. Both were, as already noted, specifically and separately submitted to the jury, and the jury found specifically and separately against Holloway upon each of them.

*Transcript of Record, page 26.*

In the second paragraph of their assignment of errors, filed with the petition for writ of error by Holloway's counsel, and appearing on page 2 of the transcript of record, the counsel aver error by the Oklahoma Supreme Court "in holding that it was not an abuse of discretion for the lower

court to submit special findings to the jury with reference to fraudulent disposition of property, there being no evidence of such fraudulent disposition of property offered on the trial of the case below and none contained in the record."

In reply to this, we beg to state that the testimony of Bradley, found in transcript of record, page 32, 33 and 34, very clearly shows that Mr. Holloway intended to speedily dispose of his property by forced sales, if necessary,—that he did not intend to pay defendants-in-error,—that he did not intend to secure them in any way,—that he would not even execute his notes for the debt,—that he intended to dispose of his stock and then leave Oklahoma and return to Fort Worth, that he would turn over some incumbered lands in Kansas and elsewhere in payment of the debt, and would do nothing else.

This ground of attachment was that Holloway was *about to dispose of his property* with the fraudulent intent to cheat, hinder and delay his creditors. When a merchant owes an account of over $5,000 for over six months, as in Holloway's case, for goods then in his store, or previously disposed of, and declines to pay, or even to fix a date when he will pay at least a part of his debt, and then talks about reducing his stock by forced sales, etc., it looks very much as if he proposed to beat his creditors,—to defraud them.

The jury heard Holloway testify and they heard Bradley's deposition read, and they had no difficulty in reaching the conclusion that Holloway proposed to defraud his creditors as charged in the affidavit.

It is unnecessary to cite authorities upon this point, for it is too late, in any event, for Holloways's counsel to raise a question of error upon the point, even if the Court had committed error. *No objections were made by Holloway's counsel to the action of the lower court it submitting the question of Holloway's proposed fraudulent disposition of property to the jury.*

*Nor were any exceptions saved by Holloway's counsel to the action of the Court in submitting such question to the jury.*

*Transcript of Record, pages 98, 99.*

It is true that Holloway (defendant in lower court) *excepted generally* to the giving of all the instructions, but such general exceptions *cannot be tortured into an exception to the special questions.*

And we propose to show hereafter by the record that *no exceptions whatever to either the special questions or the instructions of the lower court, were properly saved by Holloway or his his counsel*; and that it is too late now for them to complain of the instructions.

In the first paragraph in their "assignment of errors" filed with the petition for writ of error by Holloway's counsel appearing on page 1 of the transcript of record, the counsel aver "That the Oklahoma Supreme Court found that the lower court erred in it its instructions numbered eight and eleven, and that the Supreme Court erred in holding such instructions to be harmless by reason of the fact that there was an allegation of fraudulent disposition of property in the affidavit for attachment, which was sufficient to support the judgment of the court."

In reply to the above, we have to say that the Supreme Court of Oklahoma *did not find said instructions numbered eight and eleven were erroneous.*

The most that can be said in favor of the claim or assertion is that the Oklahoma Supreme Court expressed itself as "not certain" whether the lower court had stated the law correctly or not.

*Transcript of Record, (opinion), page 109.*

The Oklahoma Supreme Court expressly declared that, for reasons given, it did not deem it necessary to pass upon the question of the correctness or incorrectness of those instructions.

*Transcript of Record, page 109.*

And notwithstanding the expressed doubt of the Oklahoma Supreme Court as the correctness of the instructions, eight and eleven, we submit that the instructions taken together correctly state the law.

*Work's Indiana Practice, Vol. 1, Secs. 781 to 784.*
*Burgett vs. Burgett, 43 Ind. 78.*
*Rollins vs. The State, 62 Ind. 46.*
*Sullivan vs. State, 52 Ind. 309.*
*Work's Indiana Practice, Vol. 2, Sec. 1225, p. 195.*
*Story on Conflict Laws, Sec, 41.*
*Somerville vs. Somerville, 5 Vesey, 787.*
*Harvard vs, Gore, 5 Pick. 370.*
*Wharton's Conflict of Laws, Sec. 55.*
*Adams vs. Evans. 19 Kans. 176.*

In the last case above cited, Justice Brewer, speaking for the Court, says that "in order to accomplish a change of residence, there must be not only the *intention to change*, but the fact of removal. *Neither is sufficient without the other.*"

The testimony of J. H. Bradley, upon which the jury doubtless fully relied, shows clearly *that Holloway was not and did not intend to become a resident of Oklahoma at the time of the beginning of the suit and levy of the attachment.*

Bradley testifies that he asked Holloway "If he had made the change" from Fort Worth, Texas, to Oklahoma

City, "with the intention of making Oklahoma City his permanent home." That Holloway replied: "*No; it was his intention to dispose of all or as large a portion of his stock as he could and then return to Fort Worth, and thought he would go into the millinery business there*; that there was more money in that than in general merchandising."

Bradley continues: "I told him that I noticed his awning sign still hanging at Fort Worth, and he (Holloway) said yes, but that he would never return to the old store as the location was poor. I then said to him (meaning Holloway): This move, then, is an experiment, and you still regard Fort Worth as your home? And he said 'Yes'."

*Transcript of Record, page 32.*

Holloway's own testimony, while contradicting Bradley's, shows that he had, at least prior to bringing his stock of merchandise to Oklahoma, a fixed residence at Fort Worth, Texas. This being the case, Fort Worth, Texas, remains and continues to be his residence, within the meaning of the attachment law, until it is clearly shown to have been abandoned.

"The residence of a man having a family which he maintains, is *prima facie*, where that family dwells. A man's acts and conduct are more to be considered in determining the question of a change of residence than any mere declaration of intent; and when the question of residence or nonresidence is doubtful, the question should be so determined as will best secure the rights of creditors and others having dealings with such party."

*Keith vs. Stetter, 25 Kans. 103.*

We respectfully submit that the criticisms made by the Oklahoma Supreme Court upon the instructions of the

lower court upon the question of residence or non-residence of Holloway are not well founded.

In the case last cited, Judge Brewer says:

"We find it laid down in all authorities that an original domicile, whether of birth or otherwise if lonce fixed clings closely, and we conceive that it can never be changed by the mere intent of the party. The act must accompany and verify the intent. As the homely proverb asserts; 'Actions speaks louder than words,' actions must corroborate and confirm the words. The fact and the intent must concur. (Hart vs. Horn, 4 Kas. 239.)

"Doubtless residence and domicile are not absolutely synonymous terms, but evidently from the facts of that case domicile was used in the sense and as the equivalent of resi. dence. And in so far as there may be any distinction between the two terms, it is not a distinction affecting the rule as stated,

"Defendant's residence confessedly was fixed and established for many years in New York. This, while his business was carried on in Atchison. * * * * Defendant's family dwelt in New York; they were established there. They had never moved."

We quote further: "When a man voluntarily places himself in a position where all that is visible and tangible in his life is consistent with either residence or non-residence, the actual fact as to which, depends solely upon his own intent, and there is that is his business transactions which is strongly indicative of fraud, it in the duty of the Court to so hold as will best secure and protect the rights of creditors and others having dealings with such party. *Whenever the issue comes squarely between a party's secret purpose and the security of creditors, the latter should control.*"

*Keith vs. Stetter, 25 Kas. 103, 104, 105.*

In comparison with the strong and vigorous language of Judge Brewer above quoted, we cannot forbear to express the opinion that the eighth and eleventh instructions of the lower court, in the case at bar, are quite modest and moderate, and that the rule is correctly stated therein.

No one, who has had frequent occassion to examine this question of residence and non-residence in attachment, is unfamiliar with the fact that there has been a great deal of hair splitting and considerable diversity of opinion among the courts of the country, and particularly among the Judges and courts of the Western States, about the matter.

But we submit that the rule was fairly stated by Judge Brewer in *Keith vs. Stetter*, and that the lower court, in its instructions in the case at bar, did not misstate the law.

In the third paragraph in the "assignment of errors" filed with the petition in error (Transcript of Record, page 1.), Counsel for Holloway insist that the Oklahoma Supreme Court erred "in holding and affirming the judgment of the Court below," in spite of the fact that the lower court erred in giving the 12th instruction, to-wit:

"You need not be unanimous in determining what your verdict shall be; nine of you can determine upon a verdict."

The Supreme Court of the United States has squarely passed upon a similar instruction and upon a similar territorial statute upon which the instruction is based in a recent similar case, and has held that such a law is unconstitutional, and that a verdict rendered by a less number of jurors than the entire panel of twelve, cannot be permitted to stand, under proper objection and exception by the party against who such verdict is rendered.

*Amer. Pub. Co. vs. Fisher, 166 U. S. 464.*

But, no matter how erroneous the 12th instruction was and is,—no matter what the Court may think of it as a

legal proposition, we submit that plaintiff-in-error cannot now avail himself of such error at this time.

No exception was saved in the court below by plaintiff-in-error, as to the 12th instruction, neither did the motion for new trial, filed by plaintiff-in-error in the lower court, assign said 12th instruction as error, or as ground for a new trial of said cause.

*Transcript of Record, pages* 27, 28.

In plaintiff-in-error's said motion for a new trial, he assigned as grounds for such new trial pretty nearly everything, evidently, that his counsel could think of, except that he did not assign error in the 12th instruction, Evidently, Holloway and his counsel did not think, at the time the instructions were given, nor later on on the following day when they filed the motion for new trial, that this 12th instruction was erroneous.

The Supreme Court of Oklahoma, in its final opinion in the case, holds said 12th instruction to be erroneous, and then that court adds:

*"But no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors. We cannot therefore, consider the objection."*

*Transcript of Record page 109.*

Certainly the plaintiff-in-error, in not excepting to the in-instruction at the time it was given, nor should be thereafter, in his motion for new trial, assigning it as error, must be held to have acquiesced in that instruction; and if the instruction was erroneous, the plaintiff-in-error, by his failure to except thereto, or assign it as error in his motion for new trial,

must be held to have waived such error, and cannot now be permitted to assign such instruction as erroneous.

And the further fact that plaintiff-in-error did not ask to have the jury polled also shows that he acquiesced in this 12th instruction, or else, that he knew the verdict was unanimous, and that a poll would only serve to more definitely establish the fact.

In behalf of the defendants-in-error, we desire to ask the particular attention of the Court to all the alleged exceptions to the instructions of the Court and to the refusal of the Court to give instructions as requested by the plaintiff-in-error claimed to have been taken and saved by plaintiff-in-error in the trial of this cause in the lower court, *and especially to the manner in which the record shows they were taken.*

*Transcript of Record, pages 99, 100.*

We respectfully submit that such exceptions were not taken and saved, as required by the statute (Civil Code of Indiana) then adopted and in force in Oklahoma Territory.

*Oklahoma Statutes (1890), page 842, Secs. 4564, 4568.*

The sixth paragraph of section 4564 is as follows:

"When either party asks special instructions to be given to the jury, the Court shall either give instructions as requested, or positively refuse to do so; or, give the instructions with a modification, in such manner that it shall distinctly appear what instructions were given, in whole or in part, and, in like manner those refused, so that either party may except to the instructions as asked for, or as modified, or to the modification. All instructions given by the Court must be signed by the judge, and filed together with those

asked for by the parties, as a part of the record. The instructions shall not be entered at large on the final record, unless either party may wish to remove the cause to a district court."

Section 4565 is as follows:

(4565) 19. "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exception; but it shall be sufficient to write on the margin or at the close of such instruction, 'refused or excepted to,' or 'given and excepted to,' which memorandum shall be signed by the judge, and dated."

This statute of 1890, which was the law in force in Oklahoma Territory when this cause was tried is identical with the Indiana Civil Code, that entire code having been adopted by the territorial legislature, and which went into effect in Oklahoma Territory on the 25th day of December, 1890.

The decisions of the Supreme Court of Indiana, prior to the Oklahoma enactment, upon the matter and proper manner of taking exceptions, to be made available in an appellate court, are controlling, according to a well known rule of construction.

The exceptions can only be saved in the manner pointed out by the statute.

*Newby vs. Warren, 24 Ind. 161.*
*Krock vs. Wolf, 39 Ind.* 88.

It is necessary that the exceptions and the assignments of error based thereon, should indicate each instruction separately, which is alleged to be erroneous. And where instructions given to a court by a jury consist of several distinct propositions, *a general exception to the instructions is unavailing, if any one of them is correct.*

*Elliot vs. Woodward,* 18 *Ind.* 183.

*Garrigus vs. Burnett*, 9 *Ind.* 528.
*Jolly vs. Terre Haute Bridge Co.*, 9 *Ind.* 471.
*Murray vs. Fry*, 6 *Ind.* 371.
*Sherlock vs. First Nat. Bank*, 13 *Ind.* 73.
*Olds vs. Deckman*, 98 *Ind.* 162.
*Short vs. Stutsman*, 81 *Ind.* 115.

In conclusion, counsel for defendants-in-error beg to say that the transcript of record and bill of exceptions in this case is in such a jumbled condition that it has been almost impossible for them to discover either the proper beginning or end of it.

We were not the attorneys who represented defendants-in-error in the trial of this cause in the lower court.

Neither have we been favored by plaintiff-in-error or his counsel with a copy of their brief, either in this or in the Supreme Court of Oklahoma.

We desire finally to call the attention of the Court to the fact that there is nothing in the record to show that the original bill of exceptions in the case was presented to the judge of the lower court for allowance during the term of the court at which the cause was tried, nor is there anything in the record to indicate that it was allowed or signed by the trial judge during such term.

The transcript of record (see page 102) shows the following:

"And the defendant now tenders this his bill of exceptions, and prays that the same may be signed, sealed and made a part of the record; which is done this 25th day of June, 1892."

Below this appears the following:

"December 25th, 1892. John G. Clark, Judge."

This was manifestly long after and beyond the term, and there is nothing in the record to show the cause for such delay.

In fact, it appears from the transcript that there were two bills of exceptions, one beginning on page 21 of the transcript and ending on page 90 of said transcript,—the other beginning on page 94 and ending on page 102 of the transcript. How it happens that each of them recites that it was presented, signed and sealed on the 25th day of June, 1892, and yet does not appear to have been actually signed by the trial judge until the 25th day of December, thereafter, we are at a loss to determine.

Doubtless the distinguished counsel for plaintiff-in-error could explain this satisfactorily, at least to themselves.

It would seem, however, that, from the nature of the *praecipe* filed by Holloway's counsel in the lower court (*see transcript page* 91,) that the bill of exceptions was never, in fact, completed until after the 26th day of January, 1893, the date of such *praecipe*, and that, consequently, it could not have been signed by the trial judge until afterwards.

It is certainly a much mixed and very uncertain record.

The Supreme Court of Oklahoma, in its final decision of the case, upon the rehearing, calls attention to the fact that the "original bill of exceptions in that court, contained none of the 'evidence of the witnesses,' but there appeared to be a second or substituted bill of exceptions containing all the evidence."

*Transcript of Record, page 108.*

And the Supreme Court of Oklahoma adds to the above statement that, "*as it will make no difference in the final conclusion reached, we will consider the bill of exceptions containing the transcript of the entire proceedings.*"

*Transcript of Record, page 108.*

This, on the part of the Court, was very liberal,—to plaintiff-in-error,—especially as the language of the Court seems to indicate that this larger bill of exceptions had been *substituted* in that Court without leave of the Court having been obtained, and, so far as appears, without the knowledge of defendants-in-error.

It would seem to us that the appeal of plaintiff-in-error should have been dismissed by that Court for uncertainty in the record presented by him for the consideration of the Court.

Respectfully submitted,

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